

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

**SHERRY GAINES, individually and
on behalf of others similarly situated,**

Plaintiff,

v.

**NATIONAL WILDLIFE
FEDERATION,**

Defendant.

Case No. 4:22-cv-11173
Hon. F. Kay Behm

Magistrate Judge Curtis Ivy, Jr.

**DEFENDANT'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S CORRECTED MOTION FOR LEAVE TO FILE A
NOTICE OF SUPPLEMENTAL AUTHORITY**

STATEMENT OF ISSUES PRESENTED

1. Whether the unadopted Report and Recommendation from *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF. No. 41 (E.D. Mich. March 3, 2023), that Plaintiff seeks to submit to the Court, is persuasive authority as to the issues presented in NWF's Motion to Dismiss (ECF No. 18) and should thus be accepted by the Court as supplemental authority?

Defendant's Answer: NO.

STATEMENT OF CONTROLLING/MOST APPROPRIATE AUTHORITY

The controlling authority for this Motion includes:

1. *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023).
2. *Bozung v. Christianbook, LLC*, No. 1:22-cv-304, slip op. (W.D. Mich. Mar. 6, 2023).

NWF¹ submits this response in opposition to Plaintiff's Corrected Motion for Leave to File a Notice of Supplemental Authority ("Motion for Leave") because the Report and Recommendation from *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF. No. 41 (E.D. Mich. Mar. 3, 2023) (the "*Briscoe* R&R"), which is pending before this Court, has not been adopted and thus is not persuasive authority. The Court should deny Plaintiff's Motion for Leave to submit the *Briscoe* R&R as supplemental authority.

ARGUMENT

Plaintiff seeks leave to submit the *Briscoe* R&R to the Court as supplemental authority in an attempt to save her insufficiently pled claims. But the *Briscoe* R&R should be rejected as supplemental authority for two reasons:

First, as this Court knows, it has not adopted the R&R.² The *Briscoe* R&R is therefore neither precedential nor instructive. *See, e.g., United States v. Gaver*, No. 3:16-CR-88, 2017 WL 1134814, at *11, n.6 (S.D. Ohio Mar. 27, 2017) ("A Report and Recommendation has no precedential value unless and until adopted by the

¹ Abbreviations herein shall have the same meanings as ascribed to them in NWF's Opening Papers. (ECF No. 18.)

² The *Briscoe* R&R provides the parties 14 days to file objections, as well as 14 days for any subsequent responses. *Briscoe*, No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 10, 2023). Defendant NTVB filed a Motion for Extension of Time to File Objections to the *Briscoe* R&R. *Id.* at ECF No. 42. The District Court granted the request for an extension, setting a new deadline of March 31, 2023 for objections.

district court.”); *Leon v. Washington Mut. Bank, F.A.*, 164 F. Supp. 2d 1034, 1039 n.4 (N.D. Ill. 2001) (“Because the report and recommendation of the magistrate judge may or may not be accepted by the district judge in Rhode Island, it has no precedential authority in this case.”); *Innis v. Bankers Tr. Co. of S. Dakota*, No. 4:16-cv-00650, 2017 WL 4876240, at *5 n.2 (S.D. Iowa Oct. 13, 2017) (citations omitted) (“The Court finds this [supplemental] authority unpersuasive as it carries no precedential value. This opinion is a report and recommendation to which the plaintiffs have objected; a district judge must review the decision *de novo*.”) (internal citations omitted). For this reason, Judge David Lawson recently denied the same motion for leave to file the *Briscoe* R&R as supplemental authority in another PPPA case. *Murphy v. Active Interest Media, Inc.*, No. 2:22-cv-12159, ECF No. 31 (E.D. Mich. Mar. 9, 2023).

Second, as discussed more fully in NWF’s motion for leave to file supplemental authority (ECF No. 31), Magistrate Judge Kimberly Altman’s reasoning in the *Briscoe* R&R is wrong, and contrary to Judge Stephen J. Murphy, III’s decision in *Nashel v. The New York Times Co.*, No. 2:22-cv-10633, 2022 WL 6775657 (E.D. Mich. Oct. 11, 2022), upon which NWF relied in moving to dismiss the FAC here. (ECF No. 18, PageID.1211-15.) Without reasoning, Magistrate Judge Altman explicitly declined to follow *Nashel* and instead followed an older, outlier case from the Western District of Michigan, *Horton v. Gamestop Corp.*, 380 F. Supp.

3d 679 (W.D. Mich. 2018).³ *Briscoe*, No. 4:22-cv-10352, ECF No. 41, PageID.2697 (E.D. Mich. Mar. 3, 2023). Chief Judge Jarbou in *Bozung v. Christianbook, LLC*, No. 1:22-cv-304, slip op. (W.D. Mich. Mar. 6, 2023), another PPPA case brought by the same counsel as here and in *Briscoe*, dismissed the operative complaint in *Bozung* consistent with *Nashel*. In so doing, she rejected Magistrate Judge Altman's reasoning in the *Briscoe* R&R, finding that reasoning erroneous. *Bozung*, slip op. at 10 ("Bozung also relies upon a decision in *Briscoe* . . . in which a magistrate judge concluded that a NextMark datacard from 2022—similar to the one here—was sufficient to infer that NextMark possessed the defendant's customer data from prior to July 31, 2016. (See ECF No. 48-1, PageID.1560-1561.) The Court disagrees with that conclusion for the reasons discussed above.").

CONCLUSION

For the foregoing reasons, NWF respectfully requests the Court deny Plaintiff's Corrected Motion for Leave to File a Notice of Supplemental Authority.

Date: March 21, 2023

Respectfully submitted,

/s/ *Kristen C. Rodriguez*
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³ NWF previously distinguished *Horton* as inapposite in its briefing. (ECF No. 22, PageID.1286-87.)

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Certificate of Service

I hereby certify that on March 21, 2023, a copy of the foregoing document was filed electronically and served by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Kristen C. Rodriguez
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